
Navigation Project
Local Cooperation Agreement

Wood Island Harbor Biddeford, Maine



US Army Corps
of Engineers
New England Division

DRAFT LOCAL COOPERATION AGREEMENT

BETWEEN

THE DEPARTMENT OF THE ARMY

AND

THE CITY OF BIDDEFORD

FOR CONSTRUCTION OF THE

WOOD ISLAND HARBOR
NAVIGATION IMPROVEMENT PROJECT
BIDDEFORD, MAINE

THIS AGREEMENT, entered into this _____ day of _____, 19____, by and between the DEPARTMENT OF THE ARMY (hereinafter referred to as the "Government"), acting by and through the Commander, U.S. Army, Engineer Division, New England, and the City of Biddeford (hereinafter referred to as "[the local sponsor]"), acting by and through its Mayor with the approval of the City Council,

WITNESSETH, THAT:

WHEREAS, the authority for the construction of the navigation project at Wood Island Harbor, Biddeford, Maine (hereafter called the "Project") not specifically authorized by Congress is contained in Section 107 of the River and Harbor Act of 1960, approved July 14, 1960 (PL 86-645), as amended; and,

WHEREAS, construction of the Project is described in a report entitled Wood Island Harbor, Biddeford, Maine, prepared by the Division Engineer, US Army Engineer Division, New England, dated _____, and approved by the Chief of Engineers on _____; and

WHEREAS, the Water Resources Development Act of 1986, Public Law 99-662, specifies the cost-sharing requirements applicable to the Project; and

WHEREAS, the local sponsor has the authority and capability to furnish the cooperation hereinafter set forth and is willing to participate in project costsharing and financing in accordance with the terms of this Agreement;

NOW, THEREFORE, the parties agree as follows:

ARTICLE I - DEFINITIONS

For purposes of this Agreement:

1. The term "general navigation features of the project" shall mean the following project features assigned to commercial navigation: providing a channel through Wood Island Harbor measuring approximately 4,200 feet long, 100 feet wide and 10 feet deep at mean low water (MLW).
2. The term "total cost of construction of general navigation facilities assigned to commercial navigation" shall mean all costs incurred by the local sponsor and the Government directly related to construction of the general navigation features of the project. Such costs shall include, but not necessarily be limited to, actual construction costs, costs of preparation of contract plans and specifications, costs of relocations not performed by or on behalf of the local sponsor, costs of applicable engineering and design, supervision and administration costs, and costs of contract dispute settlements or awards, but shall not include the value of lands, easements, rights-of-way, and dredged material disposal areas, relocations performed by or on behalf of the local sponsor, non-Federal dredging of public or private channels and berthing areas, aids to navigation, nor Government costs for preauthorization studies.
3. The term "period of construction" shall mean the time from the advertisement of the first construction contract to the time of acceptance of the general navigation features of the project by the Contracting Officer.
4. The term "Contracting Officer" shall mean the Commander of the U.S. Army Engineer Division, New England, or his designee.
5. The term "highway" shall mean any highway, thoroughfare, roadway, street, or other public road or way.

ARTICLE II - OBLIGATIONS OF PARTIES

- a. The Government, subject to and using funds provided by the local sponsor and appropriated by the Congress, shall expeditiously construct the general navigation features of the project (including relocations or alterations of highway and railroad bridges), applying those procedures usually followed or applied in Federal projects, pursuant to Federal laws, regulations, and policies. The local sponsor shall be afforded the opportunity to review and comment on all contracts, including relevant plans and specifications, prior to the issuance of invitations for bids. The local sponsor also shall be afforded the opportunity to review and comment on all modifications and change orders prior to the issuance to the contractor of a Notice to Proceed. The Government will consider the views of the sponsor, but award of the contracts and performance of the work thereunder shall be exclusively within the control of the Government.

b. The Government shall operate and maintain the general navigation features of the project until the limit on Government participation, as set forth in paragraph i. of this Article, is reached.

c. The local sponsor shall provide and maintain, at its own expense, all project facilities other than those for general navigation, including dredged depths commensurate with those in related general navigation features in berthing areas and local access channels serving the general navigation features.

d. As further specified in Article III hereof, the local sponsor shall provide to the Government all lands, easements, and rights-of-way, including dredged material disposal areas, and perform all relocations or alterations of facilities other than utilities governed by paragraph e. below (except relocations or alterations of highway and railroad bridges), determined by the Government to be necessary for construction, operation, or maintenance of the project.

e. As further specified in Article III hereof, the local sponsor shall perform or assure performance of all utility relocations or alterations determined by the Government to be necessary for construction, operation, or maintenance of the project.

f. As further specified in Article VI hereof, the local sponsor shall provide, during the period of construction, a cash contribution equal to the following percentages of the total cost of construction of the general navigation facilities assigned to commercial navigation:

1. 10 percent of the costs attributable to the portion of the project which has a depth not in excess of 20 feet;

g. As further specified in Article VI hereof, the local sponsor shall repay with interest, over a period not to exceed 30 years following completion of the project or separable element thereof, an additional 10 percent of the total cost of construction of general navigation facilities assigned to commercial navigation, depending on the value, as calculated under Article IV hereof, of items provided pursuant to paragraph d. of this Article. If the credit allowed for such items is less than 10 percent of the total cost of construction of general navigation facilities, the local sponsor shall repay a percentage of said total cost equal to the difference between 10 percent of the total cost and the percentage of the total cost represented by the value of such items. If the credit allowed is equal to or greater than 10 percent of said total cost, the local sponsor shall not be required to repay any additional percentage of the total cost.

h. The local sponsor shall pay all project costs in excess of the Federal statutory cost limitation of \$4,000,000. In no instance shall the Government's share of project costs, including preauthorization planning costs (reconnaissance studies, feasibility studies, etc.) exceed this limitation.

i. The Government's responsibility for operation and maintenance of the Project shall cease when the Government's expenditures for this

responsibility have reached the greater of \$4,500,000 less the Government's share of the construction costs of the general navigation features of the Project, or 125 percent of the Government's share of the construction costs of the general navigation features of the Project, both discounted on a present worth basis starting with the date the sponsor accepts the Project. The discount rate to be used in determining the value of future operation and maintenance expenditures will be the rate applicable to the evaluation of Federal water resource projects in the 19__ Federal Fiscal Year, ____ percent. In view of the non-Federal participation in the operation and maintenance of the Project, it is understood and agreed that the parties hereto will consult on necessity and frequency of maintenance. The Government, however, shall make the final decision on when maintenance shall occur during the period of Federal participation. When Federal participation ceases, the operation and maintenance of the Project becomes the responsibility of the local sponsor. The average annual cost for operation and maintenance of the Project is presently estimated to be \$6,600, of which the Government's share is presently estimated to be \$6,600.

j. No Federal funds may be used to meet the local sponsor's share of project costs under this Agreement unless the expenditure of such funds is expressly authorized by statute as verified in writing by the granting agency.

k. The local sponsor shall assure that the project is accessible and available to all on equal terms as defined in Exhibit A.

ARTICLE III - LANDS, FACILITIES, AND RELOCATION ASSISTANCE

a. Prior to the advertisement of any construction contract, the local sponsor shall furnish to the Government all lands, easements, and rights-of-way, including suitable borrow and dredged material disposal areas, as may be determined by the Government to be necessary for construction, operation, and maintenance of the general navigation features, and shall furnish to the Government evidence supporting the local sponsor's legal authority to grant rights-of-entry to such lands.

b. The local sponsor shall provide or pay to the Government the full cost of providing all retaining dikes, wasteweirs, bulkheads, and embankments, including all monitoring features and stilling basins, determined by the Government to be necessary for construction, operation, or maintenance of the general navigation features.

c. Upon notification from the Government, the local sponsor shall accomplish all necessary alterations and relocations of buildings, highways, railroads, storm drains, and other facilities, structures, and improvements.

d. Upon notification from the Government, the local sponsor shall perform or assure performance of all necessary alterations and relocations of pipelines, cables, and other utilities. Except for projects authorized to be constructed to depths in excess of 45 feet, nothing herein shall be

deemed to affect the ability of the local sponsor to seek compensation from other non-Federal entities for costs it incurs under this paragraph. For projects authorized to be constructed to depths in excess of 45 feet, the cost of necessary alterations or relocations shall be shared equally between the local sponsor and the owner of the affected utility.

e. The local sponsor shall comply with the applicable provisions of the Uniform Relocations Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, approved January 2, 1971, in acquiring lands, easements, and rights-of-way for construction and subsequent operation and maintenance of the project, and inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.

ARTICLE IV - VALUE OF LANDS AND FACILITIES

a. The value of the lands, easements, and rights-of-way to be credited toward the additional 10 percent of total costs the local sponsor must repay pursuant to Article II.g. will be determined in accordance with the following procedures:

1. If the lands, easements, or rights-of-way are owned by the sponsor as of the date this Agreement is signed, the credit shall be the fair market value of the interest at the time such interest is made available to the Government for construction of the Project. The fair market value shall be determined by an Appraisal, to be obtained by the sponsor, which has been prepared by an independent and qualified appraiser who is acceptable to both the sponsor and the Government. The appraisal shall be reviewed and approved by the Government.

2. If the lands, easements, or rights-of-way are to be acquired by the sponsor after the date this Agreement is signed, the credit shall be the fair market value of the interest at the time such interest is made available to the Government for construction of the project. The fair market value shall be determined as specified in subparagraph 1. above. If the sponsor pays an amount in excess of the appraised fair market value, it may be entitled to a credit for the excess if the sponsor has secured prior written approval from the Government of its offer to purchase such interest.

3. If the sponsor acquires more lands, easements, or rights-of-way than are necessary for project purposes, as determined by the Government, then only the value of such portions of those acquisitions as are necessary for project purposes shall be credited to the sponsor's share.

4. Credit for lands, easements, and rights-of-way in the case of involuntary acquisitions made within one year preceding the date this Agreement is signed or any time after the date this Agreement is signed will be based on court awards, or on stipulated settlements that have received prior Government approval.

5. For lands, easements, or rights-of-way acquired by the local sponsor within a five-year period preceding the date this agreement is signed, or any time after this agreement is signed, credits provided under this Article will also include the actual incidental costs of acquiring the interest, e.g., closing and title costs, appraisal costs, survey costs, attorney's fees, plot maps, and mapping costs, as well as the actual amounts expended for any relocation assistance provided in accordance with the obligations under this Agreement.

b. The costs of relocations or modifications of facilities (other than utilities) that will be credited towards the additional 10 percent of total costs the sponsor must repay pursuant to Article II.g. will be that portion of the actual costs incurred by the sponsor as set forth below:

1. Highways: Only that portion of the cost as would be necessary to construct substitute highways to the design standard that the State of Maine would use in constructing a new highway under similar conditions of geography and traffic loads.

2. Facilities (Other than utilities): Actual relocation costs, less depreciation, less salvage value, plus the cost of removal, less the cost of betterments. With respect to betterments, new materials shall not be used in any relocation or alteration if materials of value and usability equal to those in the existing facility are available or can be obtained as salvage from the existing facility or otherwise unless the provision of new material is more economical. If, despite the availability of used material, new material is used, where the use of such new material represents an additional cost, such cost will not be credited to the sponsor's share.

c. No credit shall be given for any costs relating to relocations or alterations of utilities.

ARTICLE V - CONSTRUCTION PHASING AND MANAGEMENT

a. To provide for consistent and effective communication between the local sponsor and the Government during the term of construction the local sponsor and the Government shall appoint representatives to coordinate on scheduling, plans, specifications, modifications, contract costs, and other matters relating to construction of the project.

b. The representatives appointed above shall meet as necessary during the term of project construction and shall make such recommendations as they deem warranted to the Contracting Officer.

c. The Contracting Officer shall consider the recommendations of the representatives in all matters relating to the project, but the Contracting Officer, having ultimate responsibility for construction of the project, has complete discretion to accept, reject, or modify the recommendations of the representatives.

ARTICE VI - METHOD OF PAYMENT

a. The local sponsor shall provide, over the term of construction, the percentages of the total cost of construction of general navigation facilities assigned to commercial navigation specified in Article II.f. hereof. Such cost is presently estimated to be \$234,000. In order to meet its share, the local sponsor must provide an initial cash contribution presently estimated to be \$23,500.

b. The initial cash contribution shall be provided as follows: 30 days prior to the award of the first construction contract, the Government shall notify the sponsor of its estimated share of project costs. Within 15 days thereafter, the sponsor shall provide the Government the full amount of the required contribution by delivering a check payable to "FAO, USAED, NEW ENGLAND DIVISION " to the Contracting Officer representing the Government. In the event that the total cost of construction of general navigation facilities assigned to commercial navigation is expected to exceed the estimate given at the outset of construction, the Government shall immediately notify the local sponsor of the additional contribution it will be required to make to meet its share of the revised estimate. Within __ days thereafter, the local sponsor shall provide the Government the full amount of the additional required contribution.

c. The Government will draw on the funds provided by the local sponsor such sums as it deems necessary to cover contractual and in-house fiscal obligations attributable to the project as they are incurred, as well as project costs incurred by the Government prior to the initiation of construction.

d. Upon completion of the general navigation features [or an agreed-upon separable element] and resolution of all relevant contract claims and appeals, the Government shall compute the total cost of construction of general navigation facilities assigned to commercial navigation and tender to the local sponsor a final accounting of its share of project costs. In the event the total contribution by the local sponsor is less than its initial required share of project costs at the time of the final accounting, the local sponsor shall, within 90 calendar days after receipt of written notice, make a cash payment to the Government of whatever sum is required to meet its initial required share of project costs. In the event the local sponsor has made excess cash contributions which result in the local sponsor's having provided more than its initial required share of project costs, the Government shall credit the excess to the additional amount the local sponsor must repay pursuant to Articlef II.g. and II.h. of this Agreement.

e. The local sponsor shall repay the additional amount required pursuant to Article II.g. of this Agreement, reduced by any excess cash contribution made during the term of construction, in equal annual installments over a period of [not more than 30] years from the date the final accounting is tendered by the Government. Such repayment shall include interest at a rate determined by the Secretary of the Treasury, taking into consideration the average market yields on outstanding marketable obligations of the United States with remaining periods to

maturity comparable to the repayment period, during the month preceding the fiscal year in which costs for the construction of the project are first incurred [or, in the case of recalculation, the fiscal year in which the recalculation is made], plus a premium of one-eighth of one percentage point for transaction costs. The interest rate shall be recalculated by the Secretary of the Treasury at five-year intervals. Nothing herein shall preclude the local sponsor from repaying this additional amount in full upon receipt of the final accounting. Should this full repayment be made within 90 days from receipt of the final accounting, there shall be no charges for interest or transaction costs.

ARTICLE VII - DISPUTES

Before any party to this Agreement may bring suit in any court concerning an issue relating to this Agreement, such party must first seek in good faith to resolve the issue through negotiation or other forms of nonbinding alternative dispute resolution mutually acceptable to the parties.

ARTICLE VIII - OPERATION AND MAINTENANCE

a. The local sponsor shall operate and maintain all portions of the project, except for general navigation features and aids to navigation, in accordance with regulations or directions prescribed by the Government.

b. The Government shall operate and maintain the general navigation features of the project as limited in Article II.i.

c. The local sponsor hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon land which it owns or controls for access to the Project for the purpose of inspection, and, if necessary, for the purpose of completing, operating, repairing, and maintaining the project. If an inspection shows that the local sponsor for any reason is failing to fulfill its obligations under this Agreement without receiving prior written approval from the Government, the Government will send a written notice to the local sponsor. If the local sponsor persists in such failure for 30 calendar days after receipt of the notice, then the Government shall have a right to enter, at reasonable times and in a reasonable manner, upon lands the local sponsor owns or controls for access to the project for the purpose of completing, operating, repairing, or maintaining those portions of the project for which the sponsor is responsible under this Agreement. No completion, operation, repair, or maintenance by the Government shall operate to relieve the local sponsor of responsibility to meet its obligations as set forth in this Agreement, or to preclude the Government from pursuing any other remedy at law or equity to assure faithful performance pursuant to this Agreement.

ARTICLE IX - RELEASE OF CLAIMS

The local sponsor shall hold and save the Government free from all damages arising from the construction, operation, and maintenance of the project, except for damages due to the fault or negligence of the Government or its contractors.

ARTICLE X - MAINTENANCE OF RECORDS

The Government and the local sponsor shall keep books, records, documents, and other evidence pertaining to costs and expenses incurred pursuant to this Agreement to the extent and in such detail as will properly reflect total project costs. The Government and the local sponsor shall maintain such books, records, documents, and other evidence for a minimum of three years after completion of construction of the project and resolution of all claims arising therefrom, and shall make available at their offices at reasonable times, such books, records, documents, and other evidence for inspection and audit by authorized representatives of the parties to this Agreement.

ARTICLE XI - FEDERAL AND STATE LAWS

In acting under its rights and obligations hereunder, the local sponsor agrees to comply with all applicable Federal and state laws and regulations, including section 601 of Title VI of the Civil Rights Act of 1964 (Public Law 88-352) and Department of Defense Directive 5500.II issued pursuant thereto and published in Part 300 of Title 32, Code of Federal Regulations, as well as Army Regulation 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army."

ARTICLE XII - RELATIONSHIP OF PARTIES

The parties to this Agreement act in an independent capacity in the performance of their respective functions under this Agreement, and neither party is to be considered the officer, agent, or employee of the other.

ARTICLE XIII - OFFICIALS NOT TO BENEFIT

No member of or delegate to the Congress, or resident commissioner, shall be admitted to any share or part of this Agreement, or to any benefit that may arise therefrom.

ARTICLE XIV - COVENANT AGAINST CONTINGENT FEES

The local sponsor warrants that no person or selling agency has been employed or retained to solicit or secure this Agreement upon agreement or understanding for a commission, percentage, brokerage, or contingent fee,

excepting bona fide employees or bona fide established commercial or selling agencies maintained by the local sponsor for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this Agreement without liability or, in its discretion, to add to the Agreement or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

ARTICLE XV - TERMINATION OR SUSPENSION

a. If at any time the local sponsor fails to make the payments required under this Agreement, the Secretary of the Army shall terminate or suspend work on the project until the local sponsor is no longer in arrears, unless the Secretary of the Army determines that continuation of work on the project is in the interest of the United States. Any delinquent payment shall be charged interest at a rate, to be determined by the Secretary of the Treasury, equal to 150 per centum of the average bond equivalent rate of the 13-week Treasury bills auctioned immediately prior to the date on which such payment became delinquent, or auctioned immediately prior to the beginning of each additional 3-month period if the period of delinquency exceeds 3 months.

b. If the Government fails to receive annual appropriations in amounts sufficient to meet project expenditures for the then current or upcoming fiscal year, the Government shall so notify the local sponsor. After 60 days either party may elect without penalty to terminate this Agreement or to suspend performance thereunder, and the parties shall conclude their activities relating to the project and proceed to a final accounting in accordance with Article VI.

ARTICLE XVI - NOTICES

a. All notices, requests, demands, and other communications required or permitted to be given under this Agreement shall be deemed to have been duly given if in writing and delivered personally, given by prepaid telegram, or mailed by first-class (postage-prepaid), registered, or certified mail, as follows:

If to the local sponsor:

Mayor's Office
City of Biddeford
City Hall
Biddeford, Maine 04005

If to the Government:

Division Engineer
New England Division, Corps of Engineers
424 Trapelo Road
Waltham, Massachusetts 02254-9149

b. A party may change the address to which such communications are to be directed by giving written notice to the other in the manner provided in this section.

c. Any notice, request, demand, or other communication made pursuant to this Article shall be deemed to have been received by the addressee at such time as it is personally delivered or on the third business day after it is mailed, as the case may be.

ARTICLE XVII - CONFIDENTIALITY

To the extent permitted by the law governing each party, the parties agree to maintain the confidentiality of exchanged information when requested to do so by the providing party.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

THE DEPARTMENT OF THE ARMY

THE CITY OF BIDDEFORD

BY: _____
Division Commander

BY: _____
Mayor

DATE: _____

DATE: _____

CERTIFICATION OF AUTHORITY

I, _____, do hereby certify that I am City Attorney for the City of Biddeford and that I have reviewed the agreement and that the City of Biddeford is a legally constituted public body with full authority and legal capability to perform the terms of the agreement between the United States of America and the City of Biddeford in connection with the Local Cooperation Agreement for the Wood Island Harbor, Navigation Improvement Project, Biddeford, Maine, and to pay damages, if necessary, in the event of failure to perform in accordance with Section 221 of Public Law 91-611, and that the person who has executed the contract on behalf of the City of Biddeford has acted within his statutory authority.

IN WITNESS THEREOF, I have made and executed this certificate this _____ day of _____ 1989.

City Attorney
City of Biddeford, Maine

EXHIBIT A

DEFINITION OF OPEN-TO-ALL ON EQUAL TERMS

Federal navigation projects must be managed in the general public interest and must be accessible and available to all on equal terms. Any number of approaches may be used to assure that all citizens desiring mooring or other access to the projects are treated impartially; it is not the Federal Government's intention to prescribe specific procedures.

A management system shall be considered acceptable provided that it:

- Makes no arbitrary distinction or requirement of any kind of allocating use of the project and ancillary facilities and services to the public except as may be consistent with the purpose for which the project was constructed.
- Does not impose arbitrary fees or arbitrary variations in fees among users. The cost of providing necessary management and ancillary facilities and services may be offset through equitable user fees based on the actual costs incurred.

Information pertinent to harbor management - including but not limited to rules and regulations, lists of mooring holders, waiting lists and fee schedules - shall be readily available to the public at all times.